No. 194.

Brief of Counsel for Pl'ff in Error.

Filed Dec 27 1892.

Supreme Court of the United States.

OCTOBER TERM, 1892.

No. 194.

PAUL J. PETIT, PLAINTIFF IN ERROR,

vs.

THE STATE OF MINNESOTA, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE UNITED STATES.

Brief for Plaintiff in Error.

17-76

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Supreme Court of the United States.

October Term, 1899.

PAUL J. PETIT,

Plaintiff in Error,

vs.

STATE OF MINNESOTA,

Defendant in Error.

BRIEF FOR APPELLANT IN ERROR.

STATEMENT OF CASE.

In March, 1898, plaintiff in error was arrested charged with keeping open a barber shop on Sunday under Section 6513, Title 10, of the Statutes of Minnesota, which reads as follows:

"All labor on Sunday is prohibited except the works of necessity or charity. In works of necessity or charity is included whatever is needful during the day for good order, health or comfort of the community; provided, however, that keeping open a barber shop on Sunday for the purpose of cutting hair and shaving beards shall not be deemed a work of necessity or charity."

The complaint under which the plaintiff in error was arrested, charged that "The defendant did wilfully, unlawfully and wrongfully do and perform labor on said day, March 6th, 1898, which said day was then and there the first day of the week, commonly called 'Sunday,' in that said Paul J. Petit did then and there keep open a barber shop for the purpose of cutting hair and shaving beards at that certain shop, known, designated and described as number 600 Nicollet avenue, and did then and there in said barber shop wilfully and wrongfully shave with a razor the face and beard of one John Doe."

The case was tried before the municipal court of the city of Minneapolis without a jury; the plaintiff there objected to the introduction of any testimony under the complaint on the ground,

First: That it does not charge a crime under the laws of the state of Minnesota; that the law under which the charge is brought is uncon-

stitutional and void, both under the said constitution and the 14th amendment of the constitution of the United States. The objection was overruled and exception taken by the defendant. See transcript of record, p. 11, Fol. 23.

The evidence shows that Paul J. Petit, the owner of the shop, was shaving a man and no other barber was present or working.

When the evidence was all in and both parties had rested, the defendant below moved that he be discharged and the action be dismissed, on the following grounds:

1st. That the complaint does not charge the defendant with a crime under the laws of this state.

2nd. That the evidence does not show the defendant to be guilty of any crime under the laws of this state.

3rd. For the reason that the acts charged in the complaint do not constitute a crime or offense under the laws of this state.

4th. That section 6513, of the General Statutes of Minnesota, under which this charge is made, is unconstitutional and is repugnant to the 14th amendment of the constitution of the United States.

5th. That said section 6513, of the General Laws of the state of Minnesota, under which this charge is made, is unconstitutional in that it is repugnant to section 7, article 1, of the constitution of this state; also on the ground that the statute in question, under which this charge is made, is an invasion of the reserved rights of this defendant under the constitution and laws of the United States and of the state of Minnesota.

The motion was denied and defendant excepted. See transcript of record, p. 18, Fols. 32 and 33.

The defendant was found guilty and was sentenced and fined by the lower court to pay a fine of ten dollars ($10.00).

The defendant thereupon made a motion for a new trial in said court, which motion was denied. See transcript of record, pp. 9 and 10.

The plaintiff in error at once effected an appeal to the supreme court of the state of Minnesota, which court affirmed the order and judgment of the municipal court. See judgment in supreme court transcript of record, p. 22, Fol. 41.

Said judgment, affirming the lower court, was entered January 9th, 1899, in the supreme court of the state of Minnesota, and a writ of error

was immediately and duly applied for to Charles M. Start, chief justice of the supreme court of Minnesota, and was by him duly allowed, and an appeal was duly effected to this court, and the records were transmitted.

SPECIFICATIONS OF ERROR.

I.

The court erred in holding to be constitutional that part of section 6513, of the statutes of Minnesota for 1894, which reads as follows: "Provided, however that keeping open a barber shop on Sunday for the purpose of cutting hair and shaving beards shall not be deemed a work of necessity or charity."

II.

The court erred in holding that said provision of the statutes of Minnesota, mentioned in specification 1, is not repugnant to the 14th amendment of the constitution of the United States.

III.

The court erred in holding that said provision of the statute, mentioned in specification 1, is not an invasion of the reserved rights of the plaintiff in error, under the constitution and laws of the United States, and that provision of the constitution of the United States which reads as follows: "Nor shall any state deprive any person of life, liberty or property without due process of law, nor deny any person within its jurisdiction the equal protection of the laws."

IV.

The court erred in finding the said plaintiff in error guilty of the charge made against him under the complaint.

V.

The court erred in sentencing the said defendant, as appears by the record herein.

VI.

The court erred in refusing defendant a new trial and denying defendant's motion therefor. See transcript of record, p. 10, Fol. 20.

BRIEF OF THE ARGUMENT.

I.

Any legislation which is not general in its scope and which affects only one class or body of citizens is in conflict with the spirit of this Government, and the 14th amendment of the Constitution of the United States; unless such class or body of citizens are classified upon some apparent, natural reason, some reasons suggested by necessity, by such a difference in the situation and circumstances of the subjects placed in a different class as suggests the necessity or propriety of different legislation with respect to them.

Johnson vs. St. Paul & Duluth R. R., 43 Minn. 222.
Nichols vs. Walter, 37 Minn. 264.
Lavalle vs. St. Paul, Minneapolis & Manitoba R. R. Co., 40 Minn. 249.
Eden vs. People, 161 Ill. 296; 32 L. R. A. 659.
Ex parte Leo Jentzsch, 32 L. R. A., p. 664. (Cal.)
City of Tacoma vs. Kreck (Wash.), 46 Pac. Rep., 255.
State vs. Granneman, 32 S. W. Rep., p. 788.
Calder vs. Bull, 3 Dallas 386.
U. S. Constitution, 14th Amendment.
Ritchie vs. The People, 155 Ill. 98.
In re Jacobs, 98 N. Y. 98.
Low vs. Rees Printing Co., 41 Neb. 127.
Ex Parte Westerfield, 55 Cal. 550.
Butchers' Union Co. vs. Crescent Cy. Co., Ill., U. S. 746.
Millett vs. The People, 117 Ill. 294.
Frorer vs. The People, 141 Ill. 171.
Ramsey vs. The People, 142 Ill. 380.
Coal Co. vs. The People, 147 Ill. 66.
People vs. Gilson, 109 N. Y. 389.
State vs. Goodwill, 33 W. Va. 179.
State vs. Loomis, 115 Mo. 307.
R. R. Co. vs. Jacksonville, 67 Ill. 37.
Cooley's Con. Lim., p. 393.
Atchison R. R. Co. vs. Baty, 6 Neb. 37.
Godcharles vs. Wigeman, 113 Pa. St. 431.

II.

Where the ostensible object of an enactment is to secure the public comfort, welfare, or safety, it must appear to be adapted to that end; it cannot invade the rights of person and property under the guise of a police regulation when it is not such in fact.

Eden vs. People, 161 Ill. 296; 32 L. R. A. 659.
Ex Parte Leo Jentzsch, 32 L. R. A., p. 664.
Ritchie vs. The People, 155 Ill. 98.
Lakeview vs. Rose Hill Cemetery Co., 70 Ill. 191.

III.

People vs. Gilson, 109 N. Y. 389.
Millett vs. The People, 117 Ill. 296.
Calder vs. Bull, 3 Dallas 386.
In re Jacobs, 98 N. Y. 109.

The barber is deprived of property without due process of law by a statute making it unlawful for him to do business on Sunday, while it does not apply to any other class of business, and such a statute is unconstitutional as especially unjust and unreasonable, working an invasion of individual liberty, since it is based upon no distinction to justify singling out that class of laborers.

Wm. S. Eden, plaintiff in error, vs. People of the State of Illinois, 161 Ill. 296; 32 L. R. A. 659; ex parte Leo Jentzsch, 32 L. R. A. 664.

IV.

The law herein contested is unconstitutional.

Eden vs. People, 161 Ill. 296; 32 L. R. A. 659.
People vs. Hanover, 149 N. Y. 195; 31 L. R. A., 689. (Dissenting opinions.)
R. R. Co. vs. Jacksonville, 67 Ill. 37.
Ex parte Leo Jentzsch, 32 L. R. A. 664.
City of Tacoma vs. Kreck (Wash.), 46 Pac. Rep. 255. (Sept. 28, 1896.)
State vs. Granneman, 33 S. W. Rep. p. 787 (Jan. 21, 1896).

ARGUMENT.

The enacting clause of the statute under which defendant was convicted was passed by the legislature of the state of Minnesota in 1885, being Sec. 225 of the Penal Code, and reads as follows:

"All labor on Sunday is prohibited, excepting the works of necessity or charity. In works of necessity or charity is included whatever is needful during the day for the good order, health or comfort of the community."

Penal Code of Minnesota, 1885, Sec. 225.

On March 7, 1887, this law was amended by adding to it the following words:

"Provided, however, that keeping open a barber shop on Sunday for the purpose of cutting hair and shaving beards, shall not be deemed a work of necessity or charity."

Laws of Minnesota for the year 1887, Chapter 54. See 1884, Statutes of Minnesota, Sec. 6513, title 10.

It is contended by the plaintiff in error that the statute as it stood before the proviso was added, did not prohibit barbering on Sunday, but that barbering was an act of necessity within the statute.

It seems too palpable for argument that shaving and keeping open a barber shop on Sunday for that purpose would be included among the things needful to the comfort and good order of the community.

The quiet observance of Sunday is the stated object of the statute, and we apprehend that the observance of Sunday is enjoined by the law by virtue of the inherent police power lodged in the legislature, as a sanitary and moral regulation. Cessation from work on Sunday is the rule, and the natural inclination of the people. But not everything can stop. There is necessity for some acts and some labor to be performed upon that day, both by the spirit of the times and the demands of civilization. Railroad trains, cable and electric cars have to run, if, for no other reason, than to carry people to the places of worship. Domestic servants have to cook; it is as necessary to eat on Sunday as on other days; grocers, butchers and milkmen have to serve their customers; newspapers have to be printed and sold and restaurants, drug stores and barber shops are necessities on that day and come within the definition of the statute as "needful to the comfort, good order or health of the community." At least the public demand, if left to itself to answer the question, without legislative interference, has demonstrated such to be the fact. Thousands of men have not acquired the art of shaving themselves, and from habits of cleanliness daily submit themselves to the hands of their barbers, and to shave on Sunday is absolutely necessary to the comfort, to the convenience, and to the cleanliness of this large class of men; and it is a shock to decency and intelligence that at this advanced day of civilization, of religious liberty and independence of thought, that an American citizen is compelled to appeal to the supreme court of the land to vindicate his right to be clean on Sunday, and to defend himself against this petty attack upon

his natural liberty. Men seek the grateful quiet of the barber shop on Sunday, and there have the barber perform their toilet, and render them presentable for the day, and surely it cannot be more reprehensible to repair to your barber to be shaved on Sunday than to take a bath at home or shave yourself. We contend that there is a limit to the police power of the state, and that it does not extend so far as to prohibit "works of necessity or charity."

It is conceded that the legislature of a state may prohibit all business on Sunday, excepting "works of necessity and charity", and that such a law would violate none of the constitutional provisions relied upon here. We contend that as the acts stood before the proviso of 1887 was added to it, barbering on Sunday was not a violation of the Sunday law, nor any law of the state, but that it was included in those acts which are "needful" during the day for "the good order, health and comfort of the community". We condemn the proviso added to the statute by the act of March 7, 1887, selecting barbers from all classes of people and passing a law prohibiting them from barbering, and contest and deny the constitutionality of the statute, *on the ground that it is class legislation and an unwarrantable extension of the police power.*

It is contended here that by the act in question that part of the 14th amendment to the United States Constitution, (Section 1), has been violated, which reads as follows:

"Nor shall any state deprive any person of life, liberty or property without due process of law, nor deny any person within its jurisdiction the equal protection of the laws."

I.

Any legislation which is not general in its scope and which affects only one class or body of citizens is in conflict with the spirit of this government, and the 14th amendment of the Constitution of the United States; unless such class or body of citizens are classified upon some apparent natural reason, some reasons suggested by necessity, by such a difference in the situation and circumstances of the subjects placed in the different class as suggests a necessity, or propriety of different legislation with respect to them.

Without considering the power of the legislature which is unquestionable, by virtue of its police laws, to prescribe by general law, a period of rest in each week from secular employments, with such exceptions as necessity compels, it seems to us that the amendment of 1887, under discussion, is class legislation. The general law, according to Sec. 222, Chap. 1, of the Penal Code, purports to be passed to prohibit certain acts which are "serious interruptions of the repose and religious liberty of the community." We do not question the general law which prohibits all labor excepting "works of necessity and charity," we only contend that this general law as it stood before the amendment, did not interfere with barbering, which was a "work of necessity." But the proviso which is added to the statute by the amendment attempts a radical change and proceeds to select certain persons, those engaged in barbering, and prohibit them from doing certain acts, namely: keeping open a barber shop for the purpose of shaving beards, etc. For reasons of its own, if any there were, our legislature has singled out that peaceable and most respectable and law-abiding class of citizens, known as barbers, and named them specifically, and told them that they alone must not keep open their shops on Sunday, though their work comes within the class defined by the statute as "works of necessity," and though such work is, of itself, without being so defined by the legislature, a "work of necessity." Is such an attempt as this class legislation? For, if it is, by the universal decisions of this country, which are cited in the first part of this brief, such enactments have been denounced as vicious, unconstitutional and void as a denial of the equal protection of the laws. The law has received, of late years, a remarkable impetus in the direction of recognizing, defending and enforcing the principle here contended for.

As was said by the supreme court of Nebraska, in Low vs. Rees Printing Co., 41 Neb. p. 135:

"For some reason, not necessary to consider, there has in modern times arisen a sentiment favorable to paternalism in matters of legislation. And further to the fact that these attempts have recently been so frequently made, we are indebted for a number of well considered adjudications bearing upon the question now presented for our consideration."

In that case the legislature enacted that for all classes of mechanics, servants and laborers, excepting only those engaged in farm and domestic labor, a day's work should not exceed eight hours. Because

of this exception, and because the legislation was not absolutely universal, affecting all classes of labor alike, the act was declared unconstitutional as denying the equal protection of laws.

In this line of argument it may be asked if all classes, with but two exceptions, cannot be restricted, how can a law restricting but one class, all other classes being excepted, hope to stand the test of the constitutional safeguard.

In Ex Parte Westerfield (55 Cal. 550), where the legislature undertook to make it a misdemeanor for any person to engage in the business of baking, for the purpose of sale, between the hours of six o'clock p. m. on Saturday and six o'clock p. m. on Sunday, the court declared the law unconstitutional, and said, per Merrick, judge:

"The act purports to be an act to provide for a day of rest. Instead of pursuing that intent, it goes on to say that certain acts, namely, the labor of baking for the purpose of sale, if performed by certain persons, namely, those engaged in the business of baking for the purpose of sale, shall constitute a crime, and shall be punished. This is special legislation. A certain class is selected * * * Even if there be authority to restrain labor on Sunday, it must be under a general law restraining labor on that day."

In the same case, Judge McKinstry, delivering a concurring opinion, said:

"A general law must include within its sanction all who come within its purpose and scope. It must be as broad as its object. If it is to be made a crime not to refrain from labor a whole or a part of any given day of the week, it must be made equally a crime as to all persons who do not so refrain, or the prohibitory law must be made applicable to all of a class, the members of which for reasons apparent upon mention of the class, may at least require, for the benefit of their health or morals, a period of rest not beneficial to any other class or individual. We might, perhaps, take notice that there are controlling reasons why clergymen should not be prohibited from pursuing their pious labors on the Christian Sabbath, and that the law might be general, which included all others, although it excluded them. So, we might, perhaps, hold that there are other special classes who might be permitted to pursue their avocations, notwithstanding the law which prohibited labor by the rest of the community, because of the fact that their peculiar pursuits involved "works of necessity," and placed them beyond the benefit of the law which would compel and enforce cessation of labor by others. But there can be no rule which will permit the prohibition of a particular kind of labor, in itself innocent and beneficial to the public. There is no reason why bakers should be forced to rest from their labors periodically, which is not applicable to many other classes of artisans and workmen. To say that every law is general within the meaning of the constitution, which bears equally upon all to whom it is applicable, is to say there can be no special laws."

Ex Parte Westerfield, 55 Cal. 550.

It may be urged, in reply, that this is not class legislation, because it treats all who engage in the barber business alike. The answer to this is well put by the supreme court of the state of Minnesota, in

Jordan vs. St. Paul & Duluth R. R. Co., 43 Minn. 223,

which says:

"Neither would it relieve the act from the imputation of class legislation, that it applied alike to all railroads. It has been sometimes loosely stated that special legislation is not class legislation if all persons brought under its influence are treated alike under the same conditions. But this is only half a truth. Not only must it treat alike, under the same conditions, all who are brought within its influence, but in its classification it must bring within its influence all who are under the same conditions. Therefore, if a distinction is made between railroad corporations and other employers, as respects their liability to their employes, it must be based upon some difference in the nature of the employment, and can only extend to cases where such differences exist."

There is no difference between the labor performed by a barber, and every other class of labor, in any degree which can avail to distinguish them as a body peculiar unto themselves, requiring legislative protection. If their labor requires them to be on their feet a greater part of the time, so does that of a sales girl, or a motoneer or conductor on a street car, and many other classes of labor, in a far greater degree. And even though some peculiar condition appertaining to barbers alone might exist, the record does not disclose it; it has not been brought to the attention of the court, and certainly it is not a condition of which the court could take judicial notice.

In the opinion written in the case at bar, by the supreme court of Minnesota, the court states that it,

"Will take judicial notice of the fact that, in view of the custom to keep barber shops open in the evening as well as in the day, the employes in them work more and during later hours than thos engaged in most other occupations, and that this is especially true on Saturday afternoons and evenings; also that, owing to the habit of so many men to postpone getting shaved until Sunday, if such shops were to be permitted to be kept open on Sunday, the employes would ordinarily be deprived of rest during half of that day."

We think that the court cannot assume such to be the fact. The labor of barber is not more onerous, and not nearly so much so as many other kinds of labor which may be thought of without mention. And it would be a wide stretch of the rule to take judicial notice of something that does not exist. There are many other kinds of labor

which require longer and later hours and more arduous work than that of the barber; and there is no real and valid distinction here by which we may distinguish the barber from all other classes of labor upon which to base a special law selecting him out and protecting him alone. If such is the case then might a legislature single out servant girls and pass a special law prohibiting them from laboring on Sunday; so also might they single out motormen, working on street cars, conductors, railroad employes, and thousands of others that we might mention who work longer and harder than barbers.

Again our supreme court in its opinion states:

"Labor is in a great degree dependent upon capital, and unless the exercise of power which capital affords is restrained, those who are obliged to labor will not possess the freedom for rest which they would otherwise exercise."

We may answer to this that a law may be passed prohibiting all labor on Sunday excepting "works of necessity and charity", and that it cannot be permitted to select out certain classes of men, for instance, railroad employes or servant girls, or blacksmiths, or motormen, or barbers, and pass a special law as to each one of these classes, prohibiting them from laboring on Sunday. Sunday is fully protected and labor is fully protected when a general law is passed prohibiting all labor on Sunday, excepting "works of necessity and charity."

The supreme court of Minnesota in its opinion in this case says:

"Under the original statute what were works of necessity or charity was largely left to be decided as a question of fact, which would often be a question for the jury; the effect of the amendment was to make this a question of law instead of fact, as to keeping a barber shop open."

If the question was one of fact for the jury under the law as it stood before the proviso was added, as is here assumed by the court, the effect of the proviso would be the same as an independent law such as the California or Illinois law; in either event the effect would be to make it not a question of law, as to whether or not it be a work of necessity, but to absolutely prohibit the work. If it is illegal in one form, it is illegal in the other, and if a law in the form of the California or Illinois law is class legislation, so would the same law be class legislation if added as a proviso to the general law. Each of the states which have held the barber closing law unconstitutional had upon its statute books at the same time, statutes similar to our general statute prohibit-

ing labor and work on Sunday excepting "works of necessity or charity."

The supreme court of this state in attempting to justify the law as a protection to labor seems to forget that this may be done by a general law, and, as was said by the supreme court of California in the case of Ex Parte Leo Jentzsch, 32 L. R. A. p. 664:

"How comes it that the legislative eye was so keen to discern the needs of the oppressed barber, and yet was blind to his toiling brethren in other vocations?"

If a general law is sufficient for all other vocations, how is it that the barber alone needs a special law.

Again the supreme court of California says:

"It is not easy to see where or how this law protects labor from the unjust exactions of capital. A man's constitutional liberty means more than has personal freedom. It means, with many other rights, his right freely to labor, and to own the fruits of his toil. It is a curious law for the protection of labor which punishes the laborer for working. Yet that is precisely what this law does. The laboring barber engaged in a most respectable, useful, and cleanly pursuit, is singled out from the thousands of his fellows in other employments, and told that, willy nilly, he shall not work upon holidays, and Sundays after 12 o'clock noon. His wishes, tastes, or necessities are not consulted. If he labors, he is a criminal. Such protection to labor, carried a little further, would send him from the jail to the poor house. How comes it that the legislative eye was so keen to discern the needs of the oppressed barber, and yet was blind to his toiling brethren in other vocations? Steam car and street car operatives toil through long and weary Sunday hours; so do mill and factory hands. There is no Sunday period of rest, and no protection for the over-worked employes of our daily papers. Do these not need rest and protection? The bare suggestion of these considerations shows the injustice and inequality of this law. In brief, whether or not a general law to promote rest from labor in all business vocations may be upheld as within the due exercise of the police power as imposing for its welfare a needed period of repose upon the whole community, a law such as this certainly cannot. A law is not always general because it operates upon all within a class. There must be back of that a substantial reason why it is made to operate only upon a class."

The constitutionality of the barber closing law has been construed within the last three years in the supreme court of Illinois, New York, California, Washington and Missouri.

In Eden vs. People, 161 Ill. 296, considering such a law the supreme court states:

"By the act in question an attempt has been made by the legislature to inaugurate a radical change in the law as to a class of the laboring element of the state,—the barbers. This statute, as has been seen,

declares "that it shall be unlawful for any person or persons to keep open any barber shop or carry on the business of shaving, haircutting, or tonsorial work on Sunday." That act is plain and its meaning is obvious. The owner of a place where is carried on the barber business is prohibited from doing any business whatever during one day in the week. He may have in his employ a dozen men, and yet during one day in seven he is deprived of their labor, and also deprived of his own labor. The income derived from his place and his own labor and the labor of his employes are his property, but the legislature has by the act taken that property from him. The journeyman barber who works by the day or the week or for a share of the amount he may receive from customers for his services is by the law denied the right of laboring one day in the week. He may rely solely upon his labor for the support of himself and family, his labor may be the only property that he possesses, and yet this law takes that property away from him. His labor is his capital, and that capital is all the property he owns. Can a law which takes that from the laborer be sustained? The constitution of the United States says the state shall not deprive any person of property without due process of law, and our state constitution declares the same thing. What is understood by the term "due process of law" is not an open question. "Due process of law" is synonymous with "law of the land," and the "law of the land" is general public law, binding upon all the members of the community, under all circumstances; and not partial or private laws, affecting the rights of private individuals or classes of individuals.

"Is the act in question a law binding upon all the members of the community? A glance at its provisions affords a negative answer. The act affects one class of laborers, and one class alone. The merchant with his clerks, the restaurant keeper with his employes, the clothing house proprietor, the blacksmith, the livery stable keeper, the owners of street car lines, and people engaged in every branch of business, are each and all allowed to open their respective places of business on Sunday, and transact their ordinary business if they desire; but the barber, and he alone, is required to close his place of business. The barber is thus deprived of property without due process of law, in direct violation of the constitution of the United States and of this state."

In Ex Parte Leo Jentzsch, 32 L. R. A., p. 664, the supreme court says:

"A law is not always general because it operates upon all within a class. There must be back of that a substantial reason why it is made to operate only upon one class, and not generally upon all. As was said in Pasadena vs. Stinson (91 Cal. 238), "The conclusion is, that although a law is general and constitutional as it applies equally to all persons embraced in a class formed upon some natural or intrinsic or constitutional distinction, it is not general or constitutional if it confers particular privileges, or imposes peculiar disabilities or burdensome conditions in the exercise of a common right upon a class of persons, arbitrarily selected from the general body of those who stand in precisely the same relation to the subject of the law, and in Dorsey vs. Mayor, etc. San Jose, 104 Cal. 642): "The classification, however, must be founded upon differences which are either defined by the con-

stitution or natural, and which will suggest a reason which might be held to justify the diversity of legislation.'" And in that case it was held, as stated in the syllabus of the case, "A statute prohibiting barbers to carry on business after twelve o'clock on Sundays, or on a legal holiday, and applying to no other class of labor, is unconstitutional, unjust and unreasonable, working an invasion of individual liberty, since it is based upon no distinction to justify singling out that class of labor."

In the case of City of Tacoma vs. Kreck (Wash.), 46 Pac. Rep. 255, the court held such a law unconstitutional, on the ground that it was class legislation, and, in delivering the opinion, the court said:

"One class of people is singled out by the law, while other laboring people, in different characters of employment, are allowed to prosecute their work. Conceding for the purpose of this case, the right of the legislature to pass a law restraining or forbidding manual labor on Sunday, yet under the provisions of our constitution, the restrictions must be imposed alike upon all residents of the state, or the effect of the law would be to work privileges and immunities upon one class of citizens which did not equally belong to all other citizens. * * * It is true there are some decisions, notably in the state of New York, holding the contrary view; but we are satisfied with the reasoning of the cases cited, and, therefore, hold the law unconstitutional."

In the case of State vs. Granneman, 33 S. W. Rep. p. 787 (Mo.), the supreme court of Missouri decided such a law unconstitutional, and says:

"A general law prohibiting all kinds of labor on Sunday may not only be passed, but we have such a law now upon our statute books. The fact that laboring on Sunday may be prohibited by proper legislation, as a police regulation, does not place the act beyond or without the inhibition of our constitution. If the act is valid, then why may not the legislature, by one act, forbid the farmer from laboring on Sunday, by another a blacksmith, and so on, until all kinds of labor on that day are prohibited? Clearly, this may be done by a general law embracing all kinds of labor. The object of the constitution is manifest. It was to prohibit special legislation, and to substitute general law in place of it, whenever by general law the same end could be accomplished."

The supreme court of New York in the case of People vs. Hanover, 149 N. Y., p. 195; 31 L. R. A. 689, has held such a law constitutional, but that decision is in conflict with the great weight of authority, and, upon the question of class legislation, is directly in conflict with the great weight of authority. Three of the judges dissented from the opinion. In deciding that case, the court says:

"The statute treats all barbers alike within the same localities, for none can work on Sunday outside of New York and Saratoga, but all may work in these places until a certain hour, all are, therefore, treated

alike under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed."

We think that the case of Johnson vs. St. Paul and Duluth R. R. Co., 43 Minn. 223), states the true principle distinguishing class legislation, where it is said:

"Not only must it treat alike under the same circumstances all who are brought within its influence, but in its classification it must bring within its influence all who are under the same conditions."

As hereinbefore stated there is no distinction between the labors of a barber and other kinds of labor which can avail to distinguish them as a body peculiar to themselves, requiring legislative protection. In a dissenting opinion from the New York case, Judge Gray says:

"But this legislation, in my opinion, is particularly objectionable, and deserving of judicial condemnation, for the reason that it discriminates unreasonably in dealing with those who are engaged in the pursuit of a lawful avocation. It certainly must be implied in our governmental system that legislation shall be equal to all, and just in its commands."

In the same case, Justice Bartlett dissenting, says:

"I think the act under consideration is vicious class legislation, and in direct violation of the 14th amendment of the Constitution of the United States, which provides that 'No state shall deprive any person of life, liberty or property without due process of law, or deny any person within its jurisdiction the equal protection of the law.' "

Upon what ground, then, can this specimen of legislation escape the criticism that it is class legislation?

"To avoid the imputation of class legislation, the classification in cases of special legislation must be made upon some apparent, natural reason, some reasons suggested by necessity, by such a difference in the situation and circumstances of the subjects placed in a different class as suggests the necessity or propriety of different legislation with respect to them." Nichols vs. Walter (37 Minn. 264); Lavalle vs. St Paul, Minneapolis & Manitoba R. R. Co. (40 Minn. 249); Johnson vs. St. Paul & Duluth R. R. Co. (43 Minn. 22).

That the work of a barber is "work of necessity" has been universally conceded. In People vs. Hanover, supra, Judge Bartlett in his dissenting opinion stated:

"The claim that the work of the barber is one of necessity, needful during the early hours of Sunday for the comfort of the community, rests upon years of practical construction of the various laws regulating the observance of the Sabbath."

We therefore submit that such an act of the legislature deprives a barber of property, "without due process of law," and denies the equal protection of the law to that class known as barbers.

II.

When the ostensible object of an enactment is to secure the public comfort, welfare or safety, it must appear to be adapted to that end; it cannot invade the rights of persons and property under the guise of a police regulation when it is not such in fact.

Having reached the conclusion that the act in question is class legislation, now if this conclusion is proper, and the act in question is of that sort so universally and repeatedly condemned by the court, then the act cannot stand unless it shall be found that the legislature has properly exercised the police power which is inherent in the government. Whether this has been done is a question for judicial determination.

In Railway vs. Jacksonville (67 Ill. 37, p. 40), the court said:

"This power is inherent in the state, and it cannot part irrevocably with its control over that which is for the health, safety and welfare of society. Like other powers of government, there are constitutional limitations to its exercise. It is not within the power of the general assembly under the pretense of exercising police power of the state to enact laws not necessary to the preservation of the health and safety of the community, that will be oppressive and burdensome upon its citizens. If it should prohibit that which is harmless in itself or command that to be done which does not tend to promote the health, safety or welfare of society, it would be an unauthorized exercise of power, and it would be the duty of the court to declare such legislation void."

If, therefore, it be urged in behalf of the validity of the act under examination, that it is an exercise of the police power, the court will closely scrutinize the contention, in view of the character of the legislative attempt, and will determine whether the police power has, or has not, been reasonably applied to a proper subject.

In order to justify so harsh an application of that power, there must appear to be something peculiarly baneful or prejudicial to the public health, safety or welfare, in the very nature of the subject affected. Is such the nature of the barber business?

In the case of Richmond vs. Moore (107 Ill. 429), on page 439, the court, having under consideration the observance of the Sabbath, in order, seemingly, to find an extreme example, and by way of reductio ad absurdum, says:

"Must a person be criminally punished for writing a letter to a friend on Sunday, or a barber for shaving a customer, or a person for

selling a cigar, or purchasing and reading a newspaper on Sunday; or for almost innumerable like acts?"

And so, neither from universal experience and knowledge, nor from the records, do we discover anything objectionable, or which is not most innocent and praiseworthy in the barber business, as conducive to neatness and cleanliness, which is, indeed, "next to Godliness." Neither the health nor the welfare of the public at large are injuriously affected; and, regarding the barbers themselves, who do the work, are they overworked in any special manner, and does their condition particularly call for legislative tutelage."

They may be required to stand long hours, but the records do not show that—and from universal knowledge it is well known that their work is not laborious, and their hours not particularly long. But, if it were so, so is that of the conductor and motorman, of the sales girl, of the servant girl, of the printer, and hundreds of others that may be called to mind. In other respects the work of the barber is not laborious, but is highly sanitary, and even luxurious.

If left to their own contracts and will to regulate their own periods of rest and work, are barbers, as a class, incompetent to do so? Surely so gross an insult to their intelligence and manhood cannot be countenanced. The legislature has not seen fit to make any such defense of the legislation in question. Neither in the title, nor in any part of the act, is it so much as hinted that the act is a sanitary or public regulation, but, on the contrary, it is an amendment to a general law, which, by the express declaration of the legislature, was passed to regulate and enforce the observance of the Sabbath day. And even though it had called it such, the constitutional rights of the people cannot be taken away "under the guise of a police regulation when it is not such in fact."

In considering this law, the court, if it sustains it at all, must be able to sustain it as a proper exercise of the police power, and not from a religious standpoint. As was stated in Ex Parte Leo Jentzsch—

"Under a constitution which guarantees to all equal liberty of religion and conscience, any law which prohibits an act not in itself contra bonus mores, because that act is repugnant to the beliefs of one religious sect, of necessity interferes with the liberty of those who hold to other beliefs, or to none at all. Liberty of conscience is preserved alike to the followers of Christ, to the Buddhist and the Mohammedan; to all who think that their tenets alone are illuminated by the light of divine truth; but it is equally preserved to the skeptic, agnostic, atheist, and infidel, who says in his heart, 'There is no God'; so it has come to be the

established rule in this state to view and construe such laws as civil and secular enactments. Thus construed, these laws, when decreed valid, are upheld as proper exercise of the police power, as an exercise of the legislative prerogative to regulate the relations, contracts, intercourse and business of society at large, and its particular members with respect to each other. Herein it is held that the legislature may pass laws for the preservation of health and the promotion of good morals. * * * Every individual is allowed so much liberty as may exist without impairment of the equal rights of his fellows. Our institutions are founded upon the conviction that we are not only capable of self-government as a community, but what is of legal necessity, that we are capable to a great extent, of individual self-government. * * * The spirit of a system such as ours is, therefore, at total variance with that which, more or less veiled, still shows in the paternalism of other nations. * * * In brief, we give the individual the utmost possible amount of liberty, and with that guaranteed him, he is treated as a person of responsible judgment, not as a child in his nonage, and is left free to work out his own destiny, as impulse, education, training, heredity and environment direct him. So, while the police power is one whose proper use makes potently for good, in its undefined scope and inordinate exercise lurks no small danger to the republic, for the difficulty which is experienced in defining its just limits and bounds affords a temptation to the legislature to encroach upon the rights of citizens with experimental laws, none the less dangerous because well meant. We think that the act under consideration gives plain evidence of such encroachment."

In the case of Ritchie vs. The People (155 Ill. 110), the court says:

"The police power of the state is that power which enables it to promote the health, comfort and welfare of society. It is very broad and far-reaching, but is not without its limitations. Legislative acts passed in pursuance of it must not be in conflict with the constitution, and must have some relation to the end sought to be accomplished; that is to say, to the comfort, welfare or safety of society. When the ostensible object of an enactment is to secure the public comfort, welfare or safety, it must appear to be adapted to that end; it cannot invade the rights of persons and property under the guise of a mere police regulation when it is not such in fact."

In the Ritchie case, the protection intended by the legislature was in behalf of women working in factories, and both the subject and the language of the act bore some justification on their face for the exercise of the police power, but the court considered the absolute rights of liberty and property and to contract without hindrance so strongly in favor of persons, women as well as men, that it overshadowed in importance the possible benefit which its restriction might be to the general health and welfare.

In how far greater degree does the sound logic of that opinion lead to the unanswerable conviction when applied to the matters herein

presented. When work, innocent in itself, harmless, supplying a great public demand, and promotive of general morality and cleanliness is, without apology or explanation, branded as criminal, when a species of liberty and property—for labor is property—belonging to a very minute portion of the total of wage earners or property holders, is summarily taken away from its possessors without compensation or reward.

In Judge Gray's dissenting opinion in the case of People vs. Hanover, supra, he says in regard to the Sunday Barber Law.

"I cannot suppose that it is to be defended as a proper exercise of the Sunday law of the state; that law includes in the "works of necessity', which it permits 'whatever is needful for the good order, health or comfort of the community.' The occupation of the barber has not been deemed unlawful under it, and it would look like a relapse into the narrow groove of earlier Puritanical belief if we should now regard it as inconsistent with the due observance of the Sabbath day. Conceding, as I do, the legislature a wide range in the exercise of what is known as the police power, I think that in this piece of legislation it has over stepped the limitations and has infringed upon the constitutional guaranties which, in effect, assure to us the enjoyment of our liberty and of our property in all reasonable ways. While it has been frequently observed that it is difficult to define the limits of the police power of the state, it is, nevertheless, agreed that an enactment in that direction must be one having reference to the comfort, the safety, or the welfare of society. * * * It cannot seriously be said that the defendant's business is one that conflicts with the comfort, safety or welfare of the community, when carried on on the first day of the week, called Sunday. * * * It is one that not merely conduces to the comfort of the individual, but promotes his decent appearance as a member of the community, and it is quite impossible to conceive of the business as in any reasonable way militating against the requirements of society with respect to the Sabbath day."

We are conscious of the fact that the American people are religious people and desirous of observing the Sabbath day, and that it is for the general good that the day be upheld as a day of rest and recreation from daily toil and business. We believe that it is a most beneficial and praiseworthy institution; and it is undeniably within the power of the legislature to pass laws for the regulation of its observance as a day set apart for religious worship, in so far as what amounts to a desecration of the day, and it is within their power to pass sanitary laws for the purpose of securing the welfare of the community. But we do not believe that such power exists so far as to interfere with, and prevent acts which are necessary to the health and comfort of the community, and which, from time immemorial, have been excepted from

the operation of the Sunday statute, and which no sincere and just man can say interferes with the due observance of the day.

And we believe that a special law picking out a certain class—one class—of laborers and saying specifically that they shall not labor on that day, is a deprivation to them of their property and clearly class legislation.

The strength and beauty of our American institutions, the glory of our liberty and that which distinguishes it from mere political liberty enjoyed by the European nations, is individual freedom, including not only the constitutional guaranties, but also those inalienable rights, unsurrendered by the social compact, cherished by all Americans as the very spirit and coloring of our freedom, and which cannot be wrested from them by majorities, nor interfered with by government, and for the defense of which they depend upon the courts of the land.

If those very persons who are most zealous in their efforts to support such a legislative mishap as that here attacked were but to exercise their foresight and reason, they could not fail to perceive the germ which they are so carefully fostering will, if developed to its full, be the means of undermining the very foundation of their liberty and those rights for which they clamor. If the great principle of universality in our laws is demolished, and in its stead paternalism and class legislation arise, it were difficult to forecaste the measure of evil that would result.

We respectfully submit that the order of the court below should be reversed, and the plaintiff in error be granted a new trial.

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